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No. 99-1745

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

AMERICAN AIRLINES, INC.,
*Petitioner,*

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## REPLY BRIEF

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## REPLY

The sheer volume of briefs filed in this case confirms its national importance, and makes clear that this Court should grant review of the single essential question presented in the petition for certiorari filed by American Airlines, Inc. ("American") – whether Section 41713(b)(3) of the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. § 41713(b)(3), preserves from preemption the "proprietary powers and rights" of local governments that own multiple airports to allocate particular types of air traffic to specific airports. The remaining petitions should be held for appropriate disposition after this central issue has been decided.

1. Guidance from this Court is plainly needed as to what "proprietary powers and rights" § 41713(b)(3) of the ADA reserves to state and local governments.

a. Even the Respondents opposing American's petition cannot agree on the meaning of the provision. They do not contest that it allows perimeter restrictions and other similar limits on the number and types of flights permitted at particular airports within a regional airport system. Nor could they. The Second Circuit specifically held that such a restriction on flights from New York's LaGuardia Airport was a permissible exercise of local "proprietary powers and rights," and thus was saved from preemption under the ADA. *Western Air Lines, Inc. v. Port Auth.*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). The Colorado Supreme Court likewise held that the ADA's "proprietary powers and rights" provision preserves broad authority to state and local governments to forbid commercial flights entirely from one airport in a regional system. *Arapahoe County Pub. Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998). Similarly, the Department of Transportation (the "Department") is forced to acknowledge that it defended as a legitimate exercise of

proprietary powers a perimeter restriction it had imposed on Washington National Airport for precisely the same reasons (preserving the economic viability of another airport) that support the restrictions at issue here. (Brief in Opposition of Respondent Department of Transportation in Nos. 99-1462, 99-1739, and 99-1745 ("Dep't Op.") at 19-20 n.17). *See City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1987).

Seeking to reconcile those results with the contrary conclusion reached by the Fifth Circuit in this case, Respondents variously suggest that those cases differ from this one because route restrictions were justified on "narrow" grounds of alleviating noise, ground congestion, or other "environmental" concerns (Dep't Op. at 16), or on the ground of preventing "severe underutilization" of an airport and preserving that airport's "economic viability." (Dep't Op. at 19-20 n.17). The common thread uniting those disparate justifications, they insist, is the "settled" principle that an exercise of local proprietary power must be "reasonable, non-arbitrary and non-discriminatory." (Dep't Op. at 16). But that test provides no meaningful guidance. Nor have Respondents offered any other administrable legal standard that explains why an exercise of "proprietary powers and rights" can legitimately encompass route restrictions in New York, Colorado and Washington D.C., but not in Dallas and Fort Worth. Indeed, the narrow reading of § 41713(b)(3) the Department now presses is sharply different from the position it took before this Court in the *Western Air Lines* case. In that earlier brief, after surveying the legislative history, the Department contended that if Congress had intended to limit local authorities to noise and traffic regulation "Congress presumably would have drafted the provision more narrowly than it did." Brief for the United States as *Amicus Curiae* in *Delta Airlines, Inc. v. Port Authority*, No. 87-333 at 7-10 (U.S.

filed March 29, 1988). Thus, local authorities do not know when they may impose restrictions of the kind at issue here, and when they may not.

b. The best the Department can do is to suggest (in a footnote) that the present case differs from the other situations where route restrictions have been upheld because § 41713(b)(3) protects only a restriction that is "currently needed," irrespective of whether the restriction was "once justified as a permissible exercise of an airport owner's proprietary rights." (Dep't Op. at 17 n.16; *see also* Brief in Opposition of Respondent Southwest Airlines in Nos. 99-1462, 99-1745 ("SW Op.") at 16-17). In other words, the covenants in the Bond Ordinance were a legitimate exercise of local proprietary powers and rights when imposed, but nevertheless remain perpetually vulnerable to a future decision that they have outlived their usefulness. What is worse, the Department claims for itself the authority to decide whether "changed conditions" justify abrogation of an airport proprietor's restrictions as a matter of regulatory discretion. The Department also arrogates to itself the discretion to choose *when* it can order a local government to come forward and prove that its previously legitimate restriction continues to have force.[1/] And these newly discovered powers are to be exercised without any meaningful substantive standards to guide decisionmaking, and are to be subject to deferential judicial review.

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1/ Here, the Department did so in a declaratory order proceeding convened under 5 U.S.C. § 554(e) without giving notice that it intended to make factual determinations, and placed the burden of proof on Petitioners to prove an absence of changed conditions. *But see* 5 U.S.C. § 556(d); *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994).

The Department's position is radical, both as a matter of substantive law and as a matter of federalism. Far from providing a reason to deny certiorari, it highlights the compelling need for review. *First*, the "currently needed" standard proposed by the Department and adopted by the Fifth Circuit quite plainly *is* a new rule of law that finds no support in the statutory text, the legislative history, or any prior judicial decision. More importantly, that new rule injects a double uncertainty into the regional planning process. Local authorities seeking to enact regional plans, and to provide the assurances necessary to the financial markets to ensure funding for the execution of such plans, do not know at the outset the scope of their substantive authority to impose restrictions on traffic at a single airport within a regional system, and likewise do not know whether the Department will pull the rug out from under them in the future on the basis of a new administration's shifting view about the meaning of the term "proprietary powers and rights." The Department disparages as "unsupported" American's claim that the Fifth Circuit's "currently needed" standard is antithetical to the long-term predictability necessary for successful regional planning. But the record shows that such restrictions were necessary to facilitate the consolidation of passenger air traffic at DFW Airport in the first instance. Without such assurances the bond markets would not have provided the long-term financing necessary to make the venture work, and airlines would not have undertaken the enormous commitments such a venture requires. Local authorities across the country will continue to confront the same situation when they seek to execute comprehensive regional plans. It is simply common sense that regional planning initiatives of the kind at issue here and in the *Arapahoe* case, as well as those underway or contemplated by other local authorities across the country, will be severely undermined by the legal rule the Fifth Circuit has announced.

*Second*, the Department's position has the perverse consequence of penalizing successful exercises of the very activity Congress intended to preserve in § 41713(b)(3). Regional authorities with the foresight to anticipate and avoid congestion, noise, and other environmental problems, by allocating air traffic among regional airports as part of a regional plan, are particularly at risk under the Department's "currently needed" standard. The more successful such efforts are, the greater the risk that the Department will decide that "changed conditions" warrant their abolition. It is precisely this uncertainty that will prevent such efforts in the first place.

At bottom, Respondents' position rests on the naive and counterfactual assumption that justifications such as reducing noise pollution or ground congestion, or ensuring sufficient utilization of an airport, are stand-alone local policy objectives. That fundamentally misunderstands the nature of regional planning, which involves a web of mutually dependent goals and undertakings. Ground congestion or noise pollution around a particular airport cannot be alleviated unless air traffic can be diverted to another airport. That cannot be accomplished unless the airport to which local authorities seek to divert the traffic is economically viable (*i.e.*, it must exist in order for the plan to work). An airport will not be economically viable if it is severely underutilized, and severe underutilization is a risk unless local authorities have some means to ensure an adequate level of air traffic at the airport. Correlatively, the financial markets will not fund the construction and expansion of an airport without adequate assurances that it will generate sufficient revenues to cover long-term financial commitments. Thus, restrictions of the kind at issue in the Bond Ordinance are not imposed "for their own sake." They are imposed as part of an effort to accomplish multiple goals within a regional plan.

*Third*, the Department's assertion that it is entitled to deference in its determination whether restrictions imposed by local authorities remain "currently needed" provides an independent federalism-based reason for this Court's review. After all, § 41713(b)(3) expresses Congress' intent that the ADA "does not limit" traditional state and local proprietary powers and rights. The Department's view that it is has been delegated by Congress standardless power to decide when state and local planning prerogatives should give way to the federal policy objectives of the ADA is thus antithetical to the very point of § 41713(b)(3). Congress cannot have intended to leave to a federal agency (subject to deferential judicial review) the power to decide the scope of reserved local authority. Particularly flawed is the Department's contention that a local restriction should be deemed "reasonable, non-arbitrary and non-discriminatory" only if it is consistent with the Department's current method of attempting to promote airline competition. (Dep't Op. at 16). If Congress intended to preserve only exercises of local proprietary power that the Department deems consistent with the ADA's competition goals, § 41713(b)(3) would not have been needed. If local actions do not materially affect airline rates, routes or service, there would be no basis for preemption to begin with. The very point of § 41713(b)(3) was to strike a balance between the federal policy of promoting competition, and state and local planning needs that might be in tension with that overarching policy in some instances. But the Department's position is devoid of balance.[2/]

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2/ The recent decision of the Texas Court of Appeals in *Legend Airlines, Inc. v. City of Fort Worth*, No. 2-99-098-CV, __S.W.3d__, 2000 WL 680256 (Tex. App. – Fort Worth May 25, 2000) adds nothing to Respondents' position. The Texas court held only that it was obligated by *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), to defer to the Department's views, even if it would have decided

c. Finally, the Department's effort to explain away the conflicts with *Western Air Lines* and *Arapahoe* is particularly unpersuasive. Respondents simply fail to answer American's point that the route restriction at issue in *Western Air Lines* was imposed for *two* reasons: "to reduce ground congestion and maintain LaGuardia as a short and medium haul airport by diverting longer haul air traffic to Kennedy and Newark." *Western Air Lines, Inc. v. Port Auth.*, 658 F. Supp. 952, 953 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). Thus, *Western Air Lines* cannot be distinguished on the basis that it applied only to a restriction designed to reduce ground congestion. Similarly, the Department here suggests that the decision of the Colorado Supreme Court in *Arapahoe* can be distinguished because that court concluded that the local restrictions at issue did not relate to routes, and thus were not within the ADA's general preemption clause in the first instance. (Dep't Op. at 20). To be sure, the Colorado Supreme Court did express a doubt as to whether the restrictions at issue related to routes. But, in the administrative proceeding instituted in response to the Colorado Supreme Court's ruling, the FAA expressly condemned the very restriction at issue in *Arapahoe* as a "violat[ion] of Congress' express prohibition, in 49 U.S.C. § 41713(b)(1), on state and local regulation of air carrier rates, routes, or services." *Centential Express Airlines*, FAA Order No. 1999-1 (Part 16, Subpart G) at p.17 (Feb. 18, 1999). The Department cannot now contend that review is unwarranted here because the restrictions in Colorado did not relate to routes.

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the case differently. *But see Christensen v. Harris County*, 120 S. Ct. 1655, 1662-63 (2000); *Medtronics, Inc. v. Lohr*, 518 U.S. 470, 512 (1996) (O'Connor, J., concurring). If anything, the Texas court's ruling increases the need for review of the Fifth Circuit's decision.

Nor can *Arapahoe* be distinguished from this case on the ground that it involved restrictions on service that had not previously existed, whereas the restrictions at issue here limited preexisting service. The ban on scheduled passenger service at Centennial Airport simply eliminates that one airport as a possible point of departure or arrival for that type of service in the Denver area. Such service must use Denver International Airport. The Dallas - Fort Worth Bond Ordinance restrictions simply eliminate Love Field as a possible point of departure or arrival for long-haul passenger service into North Texas. Such service must operate from DFW Airport.[3/] The restrictions thus have precisely the same effect.

2. The implied preemption issue raised by the Department and other Respondents is a red herring. To begin with, the Fifth Circuit did not hold (even as an alternative ground) that the Wright and Shelby Amendments impliedly preempt the requirements of the Bond Ordinance. The Fifth Circuit's decision rests entirely on the broad holding that the "proprietary powers and rights" provision of the ADA does not preserve local authority to allocate traffic among regional airports, except in extremely narrow circumstances. It is that broad holding which conflicts with decisions of the Second Circuit and Colorado Supreme Court, and which injects intolerable uncertainty into the meaning of a statutory provision designed to clarify and protect the authority of states and localities to engage in regional planning. The Fifth Circuit has not held

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3/ Respondents' assertions that Dallas is not a proprietor of DFW Airport (Dep't Op. at 10 n.8; SW Op. at 14 n.10) are wrong. Texas courts have authoritatively held that under Texas law, the DFW Airport Board is merely an agency of the Cities of Dallas and Fort Worth, and not an independent political subdivision. *City of Fort Worth v. Corbin*, 504 S.W.2d 828, 829 (Tex. 1974); *City of Irving v. Dallas/Fort Worth Int'l Airport Board*, 894 S.W.2d 456, 459 (Tex. App. – Fort Worth 1995, writ denied).

merely that Dallas and Fort Worth cannot enforce the conditions of the Bond Ordinance. It has held that the ADA prohibits any local authority from allocating traffic among airports as part of a regional plan unless the local authority can show that the allocation is "currently needed" to address local problems that the Fifth Circuit has not defined with any clarity whatsoever. Thus, whatever the preemptive scope of the Wright and Shelby Amendments, review of the Fifth Circuit's decision is necessary to ensure a nationally uniform interpretation of § 41713(b)(3) and to eliminate the destabilizing uncertainty the Fifth Circuit's decision has introduced.

In any event, Respondents' implied preemption argument is unpersuasive. The Wright and Shelby Amendments contain no express preemption provision different from the ADA's preemption provisions. It is a cardinal rule that where Congress has included an express preemption provision, the proponent of preemption faces a heavy burden to show that Congress still means to preserve implied preemption. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995). Congress had no such intent here, as the legislative history of the Wright and Shelby Amendments make plain. *See* American Pet. at 9.[4/]

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4/ Southwest's argument that this legislative history must be read in the context of CAB Order 79-9-192, 83 C.A.B. 644 (1979), is misleading. The CAB decided *only* that in granting Southwest authority to serve New Orleans under the ADA's Automatic Market Entry program, the CAB lacked authority to consider any factor other than Southwest's fitness to operate the route. The Order specfically stated that "our action . . . does not prevent [Dallas] from exercising whatever legitimate proprietary rights it has. The issue of the extent to which [Dallas's] proprietary rights may be exercised is under consideration [in other pending cases] and we will reserve

Moreover, the implied preemption issue identified by Respondents cannot be decided without first deciding the question presented in American's petition. Because the legislative history of the Wright and Shelby Amendments makes clear that Congress was not intending to alter the scope of the "proprietary powers and rights" the ADA had reserved to the local authorities in Dallas and Fort Worth (and the legislative history of the ADA itself indicated that Congress did not intend to change the terms of the Bond Ordinance, *see* American Pet. at 8), the question whether the Wright and Shelby Amendments preempt the Bond Ordinance cannot be decided until the question whether § 41713(b)(3) preserves the Bond Ordinance is first answered. Thus, Respondents' argument about the Wright and Shelby Amendments does not provide a reason to deny certiorari. It reinforces the need for this Court's review.

3. American agrees with the various Respondents that none of the other questions presented by the Petitioners in Nos. 99-1462 and 99-1739 warrant review at this time. Those petitions should be held pending decision of the issue American has raised.

## CONCLUSION

The petition for certiorari in No. 99-1745 should be granted. The petitions in Nos. 99-1462 and 99-1739 should be held.

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discussion of the point until that opinion." 83 C.A.B. at 652. Enactment of the Wright Amendment eliminated any need to decide those other cases.

Respectfully submitted,

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